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No. 84-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASOCIACION DE RECLAMANTES, AMINTA ZARATE, LUIS RIOJAS, FELIPA FLORES BENAVIDEZ, MARIA AGUIRRE DE SCHULTZ, NIEVES GUERRERO CHAPA, SANTOS ZARATE PRIETO,
Petitioners,

v.

THE UNITED MEXICAN STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED MEXICAN STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, despite the general rule of sovereign immunity established by the Foreign Sovereign Immunities Act, the United Mexican States ("Mexico") may be sued in a U.S. court on intangible claims for monetary compensation arising from claims that were originally espoused by Mexico on behalf of Mexican nationals and their heirs and subsequently extinguished pursuant to a 1941 bilateral claims settlement treaty, on the ground that the suit is one in which "rights in immovable property situated in the United States are in issue," even though those claims in no way affect title to, or possession or use of, land in the United States.

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BRIEF FOR THE UNITED MEXICAN STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Asociacion de Reclamantes v. The United Mexican States,* is reported at 735 F.2d 1517 (D.C. Cir. 1984) and reproduced in Petitioners' Appendix ("Pet. App.") at pages 1a-15a. The opinion of the United States District Court for the District of Columbia is reported at 561 F. Supp. 1190 (D.D.C. 1983) and reproduced in Petitioners' Appendix at pages 17a-38a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1984. A petition for rehearing was denied on August 28, 1984. On January 2, 1985, the time within which Respondent

was permitted to file its brief in opposition to the petition for a writ of certiorari was extended to and including February 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1982).

STATUTE INVOLVED

The petition involves the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (1982). Relevant portions of this statute are reproduced in Appendix A to this Brief.

STATEMENT OF THE CASE

Historical Background

Prior to 1848, both Mexico and Spain made grants of land located in what is now Texas. In subsequent years, many of the grantees, their heirs and descendants were driven off their land illegally. On September 8, 1923, the United States and Mexico entered into a Treaty on General Claims, Sept. 8, 1923, United States-Mexico, 43 Stat. 1730, T.S. No. 678 (the "1923 Treaty"). That treaty established a general claims commission, to which each nation was to submit, for adjudication, any claims of its citizens against the other country. 1923 Treaty, art. I. Mexico filed claims with, and sought redress from, this commission, on behalf of those grantees who had lost their land.

Protracted delays prompted the United States and Mexico to enter into another agreement on the settlement of claims. Protocol Relative to General Claims, Apr. 24, 1934, United States-Mexico, 49 Stat. 3531, E.A.S. No. 57 (the "1934 Protocol"). Pursuant to that agreement, the United States and Mexico agreed "to effect a more expeditious and more economical disposition of the claims either by means of an *en bloc* settlement or a more simplified method of adjudication." 1934 Protocol, 49 Stat. at 3532.

The general claims commission set up by the 1923 Treaty and extended by the 1934 Protocol failed to resolve any of the claims submitted by Mexico on behalf of the grantees, and its authority to hear claims expired in 1936. Thereafter, negotiations between the two sovereigns were resumed and Mexico resubmitted the claims for diplomatic settlement. The negotiations culminated in the Treaty on Final Settlement of Certain Claims, Nov. 19, 1941, United States-Mexico, 56 Stat. 1347, T.S. No. 980 (the "1941 Treaty"). By the terms of this Treaty, Mexico agreed to pay $40 million in full settlement, liquidation and satisfaction of the unadjudicated claims previously filed by both countries with the general claims commission. Both countries agreed to "reciprocally cancel, renounce, and hereby declare satisfied all claims, of whatsoever nature, of nationals of each country against the Government of the other." 1941 Treaty, art. III.

The 1941 Treaty was not self-executing and required that both countries enact legislation prior to the settlement of any claims. In 1942, the U.S. Congress enacted legislation setting up a Mexican-American Claims Commission to provide for the settlement of claims held by U.S. nationals and espoused by the United States in the treaty negotiations. Settlement of Mexican Claims Act of 1942, Pub. L. No. 814, 56 Stat. 1058 (1942).

Concurrently with Mexico's payments to the United States for the benefit of claims held by U.S. nationals, the President of Mexico issued a decree stating:

> Whereas it is the duty of the Government to tend to said claims of our nationals in order to satisfy them in accordance with the role they played in the recently concluded Convention with our neighbor country to the North and in accordance with the rules *ex aequo et bono;* as already manifested publicly in the Bulletins and official declarations made as a result of the signing of the aforementioned Convention regarding the claims.

> Whereas the claims [against the United States that were settled by the 1941 Treaty] referred to have lost their international character, and have become *internal responsibilities of our government . . . as only one of our many domestic pecuniary responsibilities.*
>
> Whereas it is necessary to have a law enacted by the honorable Congress of the Union indicating the appropriate procedure for evaluating the claims referred to in this Decree, to judge them and to ascribe to them the compensation to which they are entitled . . . .
>
> . . . . .
>
> . . . I have found it proper to order the following:
>
> **Decree**
>
> I. The Secretariat of Finance shall immediately proceed to study and prepare a draft legislative initiative, which shall be submitted to the honorable Congress of the Union, for the settlement, valuation, and payment of the Mexican claims presented to the extinct General Claims Commission . . . .

Decree of President Manuel Avila Camacho, 129 Diario Oficial § 5 (Dec. 31, 1941) [translation from Spanish] (emphasis added). While legislation necessary to establish a mechanism to adjudicate and pay the claims has not yet been submitted to the Mexican Congress, access to the Mexican courts remains available to Petitioners for the pursuit of their claims. Mex. Const. art. XVII.

The Complaint

Petitioners allege that they are descendants, heirs, and successors of the original grantees from Spain and Mexico of

land in Texas, whose land was taken illegally. Pet. App. at 50a. Alleging jurisdiction under the FSIA, Petitioners filed suit in the United States District Court for the District of Columbia. In their complaint, they sought the value of their predecessors' claims, alleged to be at least $193 million in 1941, plus interest. Petitioners also sought money damages to be paid into a fund, "the distribution of which shall be supervised by the court under an appropriate procedure to be determined." Pet. App. at 71a.

The Decisions Below

In granting Mexico's motion to dismiss, the District Court rejected Petitioners' contention that their allegations state a case in which "rights in immovable property situated in the United States are in issue" under § 1605(a)(4) of the FSIA, finding instead that the claims concerned "intangible property rights created through the diplomatic process." Pet. App. at 29a. The District Court also rejected Petitioners' argument that the fact that legislation necessary to establish a mechanism to adjudicate and pay claims has not yet been submitted to the Mexican Congress amounted to tortious conduct within the meaning of § 1605(a)(5) of the FSIA. Accordingly, the District Court held that, as a sovereign foreign state, Mexico was immune from jurisdiction, and, in addition, that the Act of State doctrine would prohibit adjudication on the merits even if jurisdiction had existed. *Id.* at 37a.

The Court of Appeals affirmed the District Court's dismissal, holding that neither the "rights in immovable property" nor the "tortious act" exception of the FSIA was applicable. *Id.* at 13a. The Court of Appeals held that Congress, in enacting the FSIA, intended to codify "the preexisting real property exception to sovereign immunity recognized by international practice," *id.* at 7a, which was limited to disputes "directly implicating property interests or rights to possession." *Id.* at 9a. The Court of Appeals also declined to find jurisdiction under the "tortious act" exception to the FSIA, ruling that Mexico's conduct lacked the required nexus with the United States, *id.* at 14a, and declined to reach the Act of State question.

ARGUMENT

The Court of Appeals' well-reasoned opinion is correct, does not conflict with any decision of this Court or of any court of appeals, and does not present any issue warranting review. The only issue before the Court of Appeals was whether United States courts have subject matter jurisdiction under the Foreign Sovereign Immunities Act over claims like Petitioners'. The Court of Appeals' carefully circumscribed construction of the FSIA's "immovable property" exception to foreign sovereign immunity is wholly consistent with the plain language, purpose and legislative history of the FSIA, and its application of that construction to the facts of this case is correct.

Bachman v. Lawson, 109 U.S. 659 (1884), and *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), on which Petitioners principally rely, are irrelevant to this case. Neither case holds or even implies that Petitioners' claims ever constituted rights in "immovable property" within the meaning of the FSIA, much less that they have that character today.

Petitioners' assertion that this case involves a "taking" by the United States in violation of the Fifth Amendment to the U.S. Constitution is equally irrelevant to a case in which Mexico is the sole defendant.

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE FOREIGN SOVEREIGN IMMUNITIES ACT'S "IMMOVABLE PROPERTY" EXCEPTION DOES NOT APPLY TO PETITIONERS' CLAIMS.

This Court has never interpreted the "immovable property" exception to the FSIA. Nor had any federal court of appeals done so prior to the decision below.

The decisions of this Court teach that statutory interpretation must begin with the language employed by Congress and the assumption that the ordinary meaning accurately expresses the legislative purpose. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 65 (1982). In interpreting the words of a statute, a court has an "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979).

A. The Court of Appeals Construed and Applied the "Immovable Property" Exception Consistently With Its Plain Language, Legislative History and Purpose.

1. Plain Language, Legislative History and Purpose

Petitioners argue that there is federal court jurisdiction in this case because of the exception to the general rule of sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Their argument, however, depends upon a reading of the exception that was correctly found by the Court of Appeals to be impermissibly expansive and unsupported by the FSIA's legislative history and purpose.

The Court of Appeals, in construing the exception as inapplicable to Petitioners' claims, looked first to the language, and found its meaning to be far from plain:

> [T]he term "rights in immovable property" is an imprecise one, susceptible of as many different meanings as there are areas of law for which that characterization of an interest may be relevant.

Pet. App. at 7a.[1]

The Court of Appeals then proceeded, as this Court has advised, to interpret the statutory language in light of its "reading of the legislative history and [its] understanding of the purpose" of the FSIA. *Id.* The purpose of the Act, it found, was

> to codify the so-called "restrictive" principle of sovereign immunity, under which foreign sovereigns are accorded immunity with regard to their sovereign or public acts (*actiones jure imperii*), but not with

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[1] Those who have treated the exception's meaning as self-evident have interpreted it, as did the Court of Appeals below at the end of the day, as limited to actions affecting ownership interests in, or rights to possession of, real property. *See, e.g.*, 7B J. Moore, M. Waxner, H. Fink, D. Epstein & G. Grotheer, Jr., *Moore's Federal Practice* § 1605 at JC-800.9 (2d ed. 1984); Boyd, *Litigation Against Foreign Governments*, Litig., Fall 1981, at 14, 16.

> respect to their commercial acts (*actiones jure gestionis*), and in addition to withhold immunity for certain narrowly defined public acts for which local adjudication was deemed imperative (*e.g.*, traffic accidents caused by employees and officials of a foreign embassy).

Pet. App. at 4a, *citing* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 20-21, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6619-20 (hereinafter cited as "House Report"). In particular, the purpose of the "immovable property" exception, one of those exceptions for "narrowly defined public acts for which local adjudication was deemed imperative," was explicitly declared by Congress to be

> to codify, with minor exceptions not relevant here, the pre-existing real property exception to sovereign immunity, recognized by international practice.

Pet. App. at 7a, *citing* House Report at 20, *referring to* Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, 26 Dep't of State Bulletin 984 (1952), *reprinted in Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 54-55 (1976).

2. The Meaning of the "Immovable Property" Exception

Having concluded that the purpose of the FSIA's "immovable property" exception was to codify preexisting "international practice," the Court of Appeals turned to that practice and found that it

> declined to extend the immunity of a foreign sovereign to "an action to *obtain possession of or establish a property interest in* immovable property located in the territory of the state exercising jurisdiction."

Id. at 7a, *quoting* Restatement (Second) of Foreign Relations Law of the United States § 68(d)(1965) and Restatement (Second) of Foreign Relations Law of the United States (Revised) § 455(1)(c) and comment b (Tent. Draft No. 2, 1981) (emphasis added). The Court of Appeals therefore concluded that the "immovable property" exception codifying that practice "is limited to disputes directly implicating [real] property interests or rights to possession," Pet. App. at 9a—in other words, to disputes whose resolution would "affect property interests in, or rights to possession of, land located in the United States." *Id.* at 13a.[2]

Because Congress intended the FSIA to codify the pre-existing U.S. foreign relations law with respect to the "immovable property" exception, the Court of Appeals' determination of the scope of that exception by reference to U.S. foreign relations law was logical and necessary. *See* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect,* 3 Yale Studies in World Public Order 14, 15 (1976) (courts are expected to interpret FSIA in light of pre-FSIA practice). Other courts have done likewise when faced with the necessity of construing the FSIA. *See McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 587 (9th Cir. 1983), *cert. denied,* 105 S. Ct. 243 (1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982); *see also* Crawford, *Execution of Judgments and Foreign Sovereign Immunity,* 75 Am. J. Int'l L. 820, 852 (1981). Any other source of meaning is less faithful to the congressional purpose and thus inherently less reliable.

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[2] The lower courts that have discussed the "immovable property" exception have viewed it as encompassing only actions establishing ownership or possessory rights in real estate. *See In re Rio Grande Transport, Inc.,* 516 F. Supp. 1155, 1160 (S.D.N.Y. 1981) ("The legislative history of § 1605(a)(4) unequivocally indicates that immovable property refers only to real estate."); *2 Tudor City Place Associates v. Libyan Arab Republic Mission to the U.N.,* 121 Misc. 2d 945, 470 N.Y.S.2d 301 (N.Y. Civ. Ct. 1983) (motion to vacate default judgment of possession); *County Board v. German Democratic Republic,* No. 78-293-A (E.D. Va. Sept. 6, 1978), *reprinted in* 17 *Int'l Legal Materials* 1404-06 (1978) (amendment of complaint to seek tax lien allowing the plaintiff to sell real estate stated case within exception).

Petitioners' contention that the scope of the "immovable property" exception is far more expansive, embracing not only "disputes directly implicating property interests or rights to possession" but also their claims, which they describe as "emanating from" and "deriving from" real property, is not supported by legislative history. The only item of legislative history cited by Petitioners in support of their interpretation is Congress' inclusion of "rent . . . and similar matters" in its enumeration of matters that local states have traditionally had the right to adjudicate. As the Court of Appeals noted, however, the mention of rent in no way implies that Congress intended to expand the traditional real estate exception to include claims like Petitioners'. Pet. App. at 9a n.5, discussing House Report at 20. Actions for rent frequently, if not always, "call into question either ownership or possessory rights." *Id.*

Petitioners' contention that the Court of Appeals should have ignored U.S. foreign relations law in favor of state law as a guide to the "immovable property" exception's meaning is equally unpersuasive. It is absurd to suggest that, in order to eliminate inconsistencies in immunity determinations by the Department of State, Congress enacted a federal law whose meaning was to be furnished by the various laws of the fifty states. *See* House Report at 7. Moreover, as the Court of Appeals noted, the term "rights in immovable property" is defined differently in different jurisdictions for different purposes. Pet. App. at 7a. Petitioners' ransacking of those laws inevitably results in what the Court of Appeals aptly termed "an artificial consensus definition," rather than a reliable indicator of congressional intent. *Id.*[3]

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[3] Even if state law were somehow relevant to the interpretation of the FSIA's "immovable property" exception, it would not expand that exception so as to encompass Petitioners' claims. That compensation awarded for the compulsory conversion of real estate may be treated, for some purposes and for some period of time, as real estate, *see* Petition at 24, is irrelevant. A compensation fund does not constitute "immovable property" for the purposes of the FSIA. *In re Rio Grande Transport, Inc.*, 516 F. Supp. 1155, 1160

(footnote continues)

Petitioners' contention that resolution of their claims, even if it will have no effect on the actual ownership of U.S. land, will require determination of "the title of Petitioners' ancestors as well as Petitioners' inheritance rights" and thus "rights in immovable property" will be "in issue" for purposes of the FSIA, Pet. at 28, is also unpersuasive. The Court of Appeals correctly determined that "rights in immovable property" for the purposes of the FSIA are rights the exercise of which would "affect property interests in, or rights to possession of, land." Pet. App. at 13a. It also determined that "[n]either the title to, nor the use of the Texas lands can conceivably be affected by the outcome of this suit." *Id.* at 11a. Since determination of ancestral title rights and inheritance rights would not affect property interests or give rise to rights of possession, those rights are not "rights in immovable property" within the meaning of the FSIA, even if consideration of such issues would be necessary to a resolution of Petitioners' claims.[4]

(footnote continued)

(S.D.N.Y. 1981) (disaster liability compensation fund not FSIA "immovable property"). Furthermore, claims like Petitioners' are not "rights in immovable property" under civil law. Actions, like Petitioners', that cannot directly affect real property, do not "assert an interest in immovable property." *See Hawthorne Oil and Gas Corp. v. Continental Oil Co.*, 377 So.2d 285 (Sup. Ct. La. 1979) (applying La. venue statute). Mexican law excludes funds owed as the result of a disposition of a claim in real property from the definition of the term "immovable." *See* Directo 558-61/2, *Fortino Lopez Cuevas y Coags.*, 3rd Chamber, Supreme Court of Justice, 1965 Rep. at 15.

[4] The Court of Appeals' reading of the "immovable property" exception is also supported by reference to the execution immunity section, 28 U.S.C. § 1610(a)(4)(B). The "immovable property" exception to jurisdictional immunity, like all other FSIA provisions, exists not in isolation but as a part of a comprehensive statute that must be read as a whole. Therefore, it must be interpreted consistently with the FSIA's exception to general immunity from attachment and execution upon a foreign state's property in the United States where "the execution relates to a judgment *establishing rights* in property . . . which is immovable and situated in the United States" 28 U.S.C. § 1610(a)(4)(B) (emphasis added). Although the language is somewhat different, there is no reason to suppose that Congress was attempting to create shades of difference between the two sections of the statute, or that the two sections should be read differently.

(footnote continues)

3. Application of the "Immovable Property" Exception

Having established that "rights in immovable property" are, for the purposes of the FSIA's narrow exception to foreign sovereign immunity, limited to property interests or rights to possession, the Court of Appeals properly turned to the precise nature of Petitioners' claims. Pet. App. at 10a-13a. The Court found that those claims are not

> property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land. Neither the title to, nor the use of the Texas lands can conceivably be affected by the outcome of this suit.

Id. at lla. For that reason, the Court of Appeals held that Petitioners' claims are outside the scope of the "immovable property" exception. *Id.*

Petitioners advance no argument, nor any evidence from which it can be inferred, that title to, or the possession or use of, U.S. land will be affected by any outcome of this suit. In the absence of any basis for characterizing Petitioners' claims as ones affecting title, possession or use, the Court of Appeals correctly concluded that those claims were outside the FSIA.

The FSIA provides the sole basis for subject matter jurisdiction over suits against foreign states. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983).[5] Since neither the "immovable property" nor any other statutory exception to

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(footnote continued)

By construing the "in issue" language of the FSIA's "immovable property" exception to jurisdictional immunity congruently with the "establishing rights in" language of the FSIA's "immovable property" exception to execution immunity, the Court of Appeals acted in accord with Congress' intent.

[5] *See* also *Ruggiero v. Compania Peruana de Vapores,* 639 F.2d 872, 875-76 (2d Cir. 1981) (Friendly, J.); *see also Rex v. Cia. Pervana de Vapores, S.A.,* 660 F.2d 61 (3d Cir. 1981), *cert. denied,* 456 U.S. 926 (1982); *Williams v. Shipping Corp. of India,* 653 F.2d 875, 877-81 (4th Cir. 1981), *cert. denied,* 455 U.S. 982 (1982).

sovereign immunity applies here, the Court of Appeals properly found that Petitioners are barred from raising their claims against Mexico in any United States court.

B. The Court of Appeals Correctly Concluded That the *Comegys* and *Bachman* Cases Do Not Bring Petitioners' Claims Within the "Immovable Property" Exception.

Contrary to Petitioners' assertion, the decision of the Court of Appeals that Petitioners' claims do not involve rights in immovable property within the meaning of the FSIA does not conflict with any "longstanding rule" established by *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), or *Bachman v. Lawson*, 109 U.S. 659 (1884). *Comegys* and *Bachman* did not hold that claims like Petitioners' involve rights in immovable property. Nor did they imply or suggest such a thing. In fact, neither *Comegys* nor *Bachman* involved immovable property at all. Both involved claims arising from the capture of ships and their cargoes belonging to U.S. citizens.

Comegys involved a claim that had already been adjudicated by an international claims commission and found to be meritorious. The only issue was the ownership of that claim between two private parties (specifically, an assignee in bankruptcy and the bankrupt). In determining which of the parties owned the claim, this Court considered whether "an indemnification for unjust captures is to be deemed . . . as in the nature of a donation, as contrasted with right," 26 U.S. (1 Pet.) at 217, and found that, under the Treaty of 1819 with Spain, it was a right. Because the question was not before it, however, this Court did not classify that right.[6] *Comegys* thus has no bearing on whether Petitioners' alleged claims are rights in immovable property within the meaning of the FSIA.

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[6] To the extent the Court's language in *Comegys* expressed a view as to the nature of the right in issue there, it contradicted Petitioners' contention. The Court speaks in terms of "indemnification" and "an existing right to compensation," 26 U.S. (1 Pet.) at 217, not of a right for recovery that would constitute a right "in" property, whether movable or immovable.

Bachman is of even less relevance. In that case, plaintiffs sued to collect a fee pursuant to a written agreement that promised them "a compensation equal to twenty-five per cent. of whatever sum shall be collected" on a claim for compensation for a captured ship, in return for their best efforts to collect on the claim. 109 U.S. at 660. Subsequent to the agreement, the defendants independently pursued their rights with respect to the claim before a tribunal established by the Treaty of Washington. Rejecting defendants' argument that their claim (and thus their obligation to pay plaintiffs) had been extinguished by that Treaty, this Court held that defendants' claim before the tribunal was the same claim contemplated by their agreement with plaintiffs. 109 U.S. at 662. However, it never held that the right in issue had the same character it had before submission of the claim to the tribunal, and never characterized the right as one in property. Thus this Court has in no way implied that Petitioners' claims maintain any character they may once have had as "rights in immovable property" despite the operation of the 1941 Treaty.

Petitioners' ultimate conclusion, on the basis of their reading of *Comegys* and *Bachman,* is that, "[a]s an essential incident of ownership, Petitioners' families were entitled to be compensated for any wrongful taking of their land, a right neither created nor extinguished by the 1941 Treaty." Pet. App. at 16. This proposition is completely irrelevant to the issue of whether this case is one in which rights in immovable property within the United States are in issue. Even if such an "entitle[ment] to compensa[tion]" exists, that fact does not bring it within the FSIA's "immovable property" exception. To the contrary, the legislative history and purpose conclusively demonstrate that such an "entitlement" would be outside the FSIA.

Moreover, Petitioners' ultimate conclusion is incorrect. The 1941 Treaty expressly undertakes to cancel, renounce and satisfy claims deriving from any such taking. 1941 Treaty, art. III. This Court has long held that, by espousing a claim of its national for injuries inflicted by a foreign government, the

espousing government makes the claim its own. *United States ex rel. Boynton v. Blaine,* 139 U.S. 306, 323 (1890); *see also La Abra Silver Mining Co. v. United States,* 175 U.S. 423 (1899); *United States ex rel. Angarica v. Bayard,* 127 U.S. 251 (1888); *Great Western Insurance Co. v. United States,* 112 U.S. 193 (1884); and *Frelinghuysen v. United States ex rel. Key,* 110 U.S. 63 (1882). The espousing government may therefore do with an espoused claim as it wishes. *Williams v. Heard,* 140 U.S. 529 (1890); *Frelinghuysen v. United States ex rel. Key,* 110 U.S. at 63; *Phelps v. McDonald,* 99 U.S. 298 (1878); *Frevall v. Bache,* 39 U.S. 95 (1840); *The Caldera Cases,* 15 Ct. Cl. 546 (1879).

International law likewise provides that:

> The government is the sole judge of what claims it will enforce, and of the manner, time, means and extent of enforcement. It may refuse to present a claim at all. After espousal of a claim, the government may abandon it, submit it to arbitration or make any other disposition thereof which it deems expedient in the public interest, *e.g.,* the government may compromise it, or release it, without compensation or for a consideration of benefit to the general public.

E. Borchard, *The Diplomatic Protection of Citizens Abroad* 366 (1915). *See also* 6 J. Moore, *A Digest of International Law,* 1012-27 (1906); L. Henkin, *Foreign Affairs and the Constitution* 262-63 (1972); Restatement (Second) of Foreign Relations Laws of the United States at §§ 212, 213; R. Lillich, *International Claims: Their Adjudication By National Commissions* 103 (1962). For this reason, the Court of Appeals correctly concluded in this case that the claims of Petitioners' predecessors were, vis-à-vis the United States and Mexico, "extinguished by the 1941 Treaty." Pet. App. at 12a.

II. THE DECISION OF THE COURT OF APPEALS RAISES NO CONSTITUTIONAL ISSUE.

Contrary to Petitioners' contention, the Court of Appeals' reading of the 1941 Treaty does not require this Court to determine whether, in entering into that Treaty, the United States committed a "taking" for which compensation should be provided under the Fifth Amendment. Pet. at 18, 19. The Court of Appeals did not reach that issue. *See* Pet. App. at 15a (Edwards, J., concurring). To reach out to that issue in this action, to which the United States is not a party, would be both unnecessary and inappropriate. If Petitioners ever sought to sue the United States in the Court of Claims, it would be soon enough for that court to reach that issue. Whether Petitioners can bring such a suit has nothing to do with this case.

CONCLUDING STATEMENT

The Court of Appeals decisively held that the "immovable property" exception to the FSIA did not apply to Petitioners' claims. While the Petition has narrowed the focus of this case to that issue alone, the United Mexican States nevertheless wishes to bring to this Court's attention several matters of special importance.

Retroactivity

The FSIA, enacted in 1976, codifies the principle of restrictive sovereign immunity, under which a foreign state is immune from the jurisdiction of U.S. courts except in rare cases with respect to its commercial and private acts—a principle that had been adopted by the Department of State as a matter of practice in 1952. Prior to that time, foreign sovereign states were absolutely immune from suit in U.S. courts.

To the extent the FSIA has changed the rule of absolute immunity, it has done so only prospectively. Neither the language nor the legislative history reveals any "unequivocal and inflexible intent," *De Rodulfa v. United States,* 461 F.2d

1240, 1247 (D.C. Cir.), *cert. denied,* 409 U.S. 949 (1972), *quoting Greene v. United States,* 376 U.S. 149 (1964), that the legislation be retroactively applied. In the absence of that intent, to modify the immunity to which Mexico would have been entitled in 1941 and to apply the FSIA retroactively to claims that allegedly arose at least 35 years prior to its enactment would be an unfortunate and an unfair result.

Act of State Doctrine

The modern touchstone of the Act of State Doctrine is judicial deference to the primacy of the executive branch in the conduct of foreign policy. *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). The essence of the doctrine is that courts, looking to the nature of a dispute and the international sensitivity of its issues, should avoid a result that unduly challenges the sovereign authority of a foreign state's government.

It is difficult to envision circumstances more sensitive or closely related to official policy of the United Mexican States than those presented in this case. Petitioners apparently seek to use the judicial power of the United States to inquire into numerous facets of Mexico's exercise of its executive and legislative prerogatives, and to force actions uniquely within the competence of the executive and legislative branches of the government of the United Mexican States. Any such invitation thus to regulate the internal affairs of a foreign sovereign state should be declined.

International Law

Any resolution of claims by Petitioners against the United Mexican States must be governed by the 1941 Treaty, part of the supreme law of the land under the U.S. Constitution. Any inconsistent resolution of those claims implicates not only United States law but international law as well. Petitioners' attempts, through the use of the U.S. courts, to rewrite the

terms of the 1941 Treaty, or to frustrate its object or purpose, or to reformulate the bilateral relationships between the United States and Mexico, should be resisted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

28 U.S.C.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. **Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. **General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the

territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

* * * *

§ 1609. **Immunity from attachment and execution of property of a foreign state**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. **Exceptions to the immunity from attachment or execution**

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.